STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

IN THE ORIGINAL JURISDICTION

Appellate Case No. 2020-001519

RICHARD BERNARD MOORE,

Petitioner,

v.

BRYAN P. STIRLING, Commissioner, South Carolina Department of Corrections,

Respondent.

BRIEF OF PETITIONER

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1. Was Petitioner's death sentence disproportionate to the penalty imposed in similar cases?

2. In determining the proportionality of the death sentence, should similar cases in which the death penalty was not imposed be considered?

INTRODUCTION

The writ of habeas corpus plays a vital role in South Carolina's capital punishment scheme. *See Butler v. State,* 302 S.C. 466, 468, 397 S.E.2d 87, 88 (1990). Serving as the pinnacle form of judicial intervention, this safeguard provides this Court with the ability to grant "relief to those who have, for whatever reason, been utterly failed by our criminal justice system." *State v. Torrence*, 305 S.C. 45, 69, 406 S.E.2d 315, 328 (1991) (Toal, J., concurring) (quoting *Butler,* 302 S.C. at 468, 397 S.E.2d at 88). In this posture, the Court's focus shifts from procedural to substantive as general appellate principles are made secondary to ultimate fairness and equity. It is through this rare yet magnifying lens that Petitioner Richard Moore now requests relief.

This is a case about proportionality review, a review that finds its origins in both United States Supreme Court precedent and the General Assembly's decision to vest this Court with the statutory duty to review all cases with a death sentence. To fulfill this duty, the Court fashioned standards to evaluate proportionality that include limiting review to only cases in which a defendant was sentenced to death. What once seemed black and white has turned to so many shades of gray as the Court's anticipated direction of the comparison pool, the frequency of death sentenced cases, and the nature of the review itself has each changed.

For it is in this gray that Moore now finds himself. The proportionality review conducted on Moore's direct appeal ignored this Court's standard for assessing proportionality and when properly applied invites only one conclusion: Moore's death sentence was not proportionate. Moreover, this case calls for a broader discussion of proportionality and the need to revisit the method of comparing cases.

While a habeas request often invokes pause, this case warrants intervention.

STATEMENT OF THE CASE

Moore was convicted of murder and sentenced to death in Spartanburg County for the September 16, 1999 shooting death of James Mahoney, a clerk at Nikki's Speedy Mart ("Nikki's"). While the State's theory was that Moore's motive was robbery, there is no dispute Moore entered Nikki's without a gun. Similarly, there is no dispute Mahoney was killed with a gun kept behind the store counter, which Moore obtained after a struggle between the two men.

At trial, the State called Terry Hadden, a patron in Nikki's the night of the incident who witnessed a portion of the events leading to Mahoney's death—including Moore's arrival. JA 9–50. According to Hadden, he arrived at Nikki's around midnight, purchased and ate some food, and lingered playing video poker. JA 14–15. Although he had his back to the sales counter, he testified he looked up when Moore walked in around 3:00 a.m. before returning his focus to the video poker machine. JA 21. Hadden maintained he did not hear anything else in the store until he heard Mahoney say, "What the hell do you think you are doing?" JA 22. He testified that when he turned around, he saw Moore with one of his hands over both of Mahoney's, at which point Moore turned, aimed a gun at Hadden, told him not to move, and fired. JA 23–24. The first shot Hadden heard that night, was the one fired at him.[1] JA 24–25. After that, Hadden fell to the floor and "play[ed] dead" and soon heard other shots. JA 24, 26. He "could not tell" how many shots were fired, JA 34, but he stayed on the floor until he heard the doorbell ring when Moore opened

[1] There is good reason to view Hadden's testimony cautiously. In addition to his admission that he could see only out of one eye due to a childhood accident, JA 11, he admitted at trial that in his initial statement to the police, taken the same day as the shooting, he did not tell the "officer about Mr. Moore holding James' hands down." JA 41. Hadden also admitted that his statement indicated he heard Moore say "Jamie, get the hell back," but Hadden denied hearing Moore make this statement when he testified at trial. JA 32. Furthermore, expert affidavits from highly qualified crime scene examiners presented in support of the original habeas petition establishes that Hadden's testimony was contradicted in multiple, materials respects by the physical evidence. *See* Petition for a Writ of Habeas Corpus, Exhibits A & B (Nov. 19, 2020).

the door and left. JA 26–27. Hadden claimed that as Moore left, he heard him say, "Let's get the hell out of here."[2] JA 27. Hadden then checked on Mahoney and called 911. JA 28.

Though Hadden did not see or hear how the confrontation between Moore and Mahoney began, there is no dispute that when Moore arrived at Nikki's, Mahoney had three firearms within arm's reach and Moore had no gun. Keith Fowler, the owner of Nikki's, testified that he kept two handguns—a .32 Magnum and a .45 caliber semiautomatic—behind the sales counter and Mahoney carried a .44 pistol on his person. JA 164–65. Ballistics expert Kenneth Whitler testified that a bullet found in the wall over the video poker machine—the first shot, according to Hadden—was fired from Fowler's .45 semiautomatic, and that the same gun was used to fire five more shots over the sales counter, including the one that killed Mahoney. JA 241, 243–44. Mahoney's .44 pistol was fired once toward the customer side of the counter and struck Moore in the left arm. *See* JA 107, 199–201, 245.

The State never explained how the confrontation began or how Moore came into possession of one of the firearms but argued that Moore obtained the .45 and fired at Hadden and then turned around to fire at Mahoney.[3] JA 359. With no video recording of what happened or testimony

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[2] Hadden's recollection on this point is almost certainly mistaken; there is no other evidence that Moore had an accomplice and the State maintained that Moore acted alone.

[3] Moore testified at his PCR hearing in 2011 in a manner, according to his trial counsel, consistent with what he told them occurred prior to trial. *See* JA 738–39. According to Moore, he stopped to buy beer and cigarettes but came up a few cents short. JA 671–73. He asked Mahoney if he could make up the difference with coins in the spare change cup, but Mahoney refused and told him he needed to "Get your black ass out of my store." JA 673–74. When Moore declined to leave, Mahoney pulled the .45 out from under the counter and a struggle ensued, with both men fighting for control over the gun. JA 674–75. During the struggle, the gun discharged, then jammed, and Moore was able to wrest it away from Mahoney, who immediately pulled his .44 from his waistband and fired at Moore. JA 675–76. The bullet grazed Moore's chest and passed through his left arm, and Moore took cover behind a pillar between the door and sales counter. JA 676–77. He cleared the jam in the .45 and, fearing Mahoney would shoot him again, fired blindly around the pillar toward Mahoney. JA 676–78. He denied turning and firing at Hadden. JA 677. "[I]t got eerily quiet," and Moore—still concerned Mahoney would shoot him in the back as he

about how the confrontation between Moore and Mahoney began, the State relied on circumstantial evidence to persuade the jury that Moore intended to commit a robbery upon entering Nikki's.[4] JA 358. Specifically, the State argued robbery was the motive based on evidence that Moore (1) walked behind the sales counter and took a bank bag with over $1400 in cash after the shooting, JA 362; (2) went to George Gibson's house earlier in the night to purchase crack and returned to Gibson's house after the shooting, JA 363; and, (3) had lost his job at Kohler and was pawning things for cash, JA 363.

Finally, the State presented evidence that Moore did not go directly to the hospital after he left Nikki's. Deputy Bobby Rollins testified he was in the area on the lookout for a black man driving a loud truck who might be injured. JA 54. Rollins heard a bang and discovered Moore backed into a telephone pole at George Gibson's house. JA 55. Moore put his hands up and repeated over and over "I did it, I did it, I give up, I give up." JA 56. Moore was then arrested without incident. JA 56–57. The bank bag containing $1408 was recovered from the front seat of Moore's truck, JA 129–30, and the .45 was recovered on Highway 9 near the store. JA 80, 84. Based on this evidence, the jury convicted Moore of murder, armed robbery, assault with intent to kill (Hadden), and possession of a firearm during the commission of a violent crime. JA 418.

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left and bleeding profusely from his own gunshot wound—walked behind the counter and saw Mahoney down on the floor. JA 680. While he was behind the counter, Moore grabbed the bag of money and left the store. JA 680.

[4] The Solicitor explicitly acknowledged that his case was based on circumstantial evidence and that they did not have all the "piece[s] to the puzzle." JA 358. For example, in an effort to generate evidence of intent, the State solicited testimony that a small meat cleaver, which was never tested for fingerprints, was found on the store's kitchen area floor near the victim, and that when Moore was arrested, there was a pocket knife in his truck. However, because no evidence indicated Moore brought either into the store, the solicitor told the jury "I don't know whether [either] was used to rob James Mahoney;" "I am not going to stand in front of you and act like I do." JA 370–71.

At the sentencing phase of Moore's trial, the State argued death was appropriate based on the crime, the impact of the crime on the victim's family, and Moore's prior criminal history.[5] The case in mitigation included evidence that Moore was an active and involved father to his stepson and two biological children, including coaching his stepson's basketball team. JA 506–10, 517. There was also testimony that Moore showed a vested interest in the children's education prior to his arrest and remained steadfast during his incarceration. JA 514. Additionally, his wife, Lynda Byrd, testified that Moore was a positive influence on their children and that he always secured a job and financially contributed to household expenses. JA 512–17. She also stated that Moore had struggled with addiction in the past, but he never brought that issue into their home. JA 513.

At the conclusion of the sentencing phase, the State argued and the jury found three aggravating circumstances: (1) murder during the commission of an armed robbery; (2) the act of murder created a great risk of death to more than one person in a public place; and (3) murder committed for the purpose of receiving money. JA 534, 573–74. The jury recommended a sentence of death, which the judge imposed. JA 575, 578–79.

On direct appeal, this Court affirmed Moore's conviction and sentence. *State v. Moore*, 357 S.C. 458, 593 S.E.2d 608 (2004). In its summary of the case, the Court did not account for the fact that Moore entered the store without a gun. *Id.* at 460–61, 593 S.E.2d at 609–10.[6] Instead, the summary began with Hadden's perspective of seeing Moore with a gun in his hand. *Id.*

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[5] The State presented the following prior charges and convictions to the jury: unlawful possession of a weapon (1985), breaking and entering with intent (1987), purse snatching (1991), common law robbery (1991), driving under suspended license (1993, 1996), violation of habitual traffic offender (1994), and assault and battery of a high and aggravated nature (1997). JA 465–87.

[6] The Court's full recitation of the facts stated:

> The charges in this case stem from the September 16, 1999, armed robbery of Nikki's, a convenience store on Highway 221 in Spartanburg. According to Terry Hadden, an eyewitness, Moore walked into Nikki's at approximately 3:00 a.m. and

Relying on this incomplete account, the opinion went on to address the Court's statutorily mandated proportionality review in a single sentence: "Further, the death penalty is not excessive or disproportionate to the penalty imposed in similar capital cases." *Id.* at 465, 593 S.E.2d at 612. The Court then cited four capital cases with the armed robbery aggravating factor in which the defendant was initially sentenced to death: *State v. Simpson*, 325 S.C. 37, 479 S.E.2d 57 (1997); *State v. George*, 323 S.C. 496, 476 S.E.2d 903 (1996); *State v. Sims*, 304 S.C. 409, 405 S.E.2d 377 (1991); and *State v. Patterson*, 285 S.C. 5, 327 S.E.2d 650 (1985), *overruled on other grounds by Torrence*, 305 S.C. 45, 406 S.E.2d 315. *Id.* at 465–66, 593 S.E.2d at 612. In the twenty-five years that have passed, however, three of the four death sentences have been vacated. *See Simpson v. Moore*, 367 S.C. 587, 627 S.E.2d 701 (2006) (reversing Simpson's convictions based on prosecutorial misconduct), *abrogated in part on other grounds by Smalls v. State*, 422 S.C. 174,

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> walked toward the cooler. Hadden was playing a video poker machine, which he did routinely after working his second shift job. Hadden heard Jamie Mahoney, the store clerk, yell, "What the hell do you think you're doing?" Hadden turned from the poker machine to see Moore holding both of Mahoney's hands with one of his hands. Moore turned towards Hadden, pointed a gun at him, and told him not to move. Moore shot at Hadden, and Hadden fell to the floor and pretended to be dead. After several more shots were fired, Hadden heard the doorbell to the store ring. He heard Moore's pickup truck and saw him drive off on Highway 221. Hadden got up and saw Mahoney lying face down, with a gun about two inches from his hand; he then called 911. Mahoney died within minutes from a gunshot wound through his heart. A money bag with $1408.00 was stolen from the store.
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> Shortly after the incident, Deputy Bobby Rollins patrolled the vicinity looking for the perpetrator of the crime. Approximately one and one-half miles from the convenience store, Deputy Rollins took a right onto Hillside drive, where he heard a loud bang, the sound of Moore's truck backing into a telephone pole. He turned his lights and saw Moore sitting in the back of a pickup truck bleeding profusely from his left arm. As Deputy Rollins ordered him to the ground, Moore advised him, "I did it. I did it. I give up. I give up." A blood covered money bag was recovered from the front seat of Moore's pick-up truck. The murder weapon, a .45 caliber automatic pistol, was found on a nearby highway shortly before daylight.

Id. 357 S.C. 458, 460–61, 593 S.E.2d 608, 609–10 (2004).

810 S.E.2d 836 (2018); Order: Finding of Mental Retardation, *George v. State*, No. 99-CP-26-1715 (Jan. 9, 2009) (resentencing Ricky George to life without the possibility of parole after finding that he is categorically exempt from capital punishment); *Patterson v. Aiken*, 480 U.S. 943 (1987) (vacating Patterson's death sentence); *Man sentenced 3rd time, gets life*, The Item (Sumter, S.C.), Jan. 25, 1988, at 5A (noting that, after a jury trial, Patterson was re-sentenced to life).

Moore subsequently sought post-conviction relief in state and federal courts, which was denied. *See generally*, JA 646–1395. After the denial of federal habeas relief, Moore petitioned this Court for a writ of habeas corpus asserting, *inter alia*, that his death sentence is disproportionate and should be vacated. On January 28, 2021, this Court ordered further briefing and oral argument on the two questions presented.

ARGUMENT

Enacted as an appellate procedural safeguard in capital cases, proportionality review was intended to protect defendants from being arbitrarily and capriciously sentenced to death. A review of the history and development of the law of proportionality in capital cases in this State indicates initial promise in the methodology used in the early cases but a deterioration in the quality of the review for two reasons: (1) an expanding universe of cases where death was imposed and (2) the failure to include other murder cases which did not result in a capital sentence. Such limitation is highlighted by Moore's case. As discussed herein, under existing standards in 2004, as well as the four proposed methods for modifying the comparison pools, Moore's sentence is disproportionate. For these reasons, this Court should grant habeas relief and vacate Moore's death sentence.

I. THE ORIGINS OF PROPORTIONALITY REVIEW IN SOUTH CAROLINA

South Carolina's death penalty statute obligates this Court to conduct a proportionality review as part of the direct appeal process. *See* S.C. Code Ann. § 16-3-20; 1977 Act No. 1977 § 1 (effective June 8, 1977). Crafted as a procedural safeguard, proportionality review is intended to serve as a backstop to ensure each death sentence is not excessive compared to sentences in similar cases—considering both the circumstances of the offense and the defendant's moral culpability. While the statutory aim is evident, the reality is that meaningful review is stifled by this Court's prior rulings limiting review to only cases in which a defendant was sentenced to death. This limitation explains why no case has ever been found by this Court to be excessive or disproportionate.

To appreciate this hitch, an understanding of the development of this review is essential, including the fact that this statute originates from the General Assembly's decision to mirror Georgia's constitutionally approved scheme. *See State v. Shaw*, 273 S.C. 194, 203, 255 S.E.2d 799, 803–04 (1979) (noting South Carolina's death penalty statute is "indistinguishable" from the Georgia statute upheld by the United States Supreme Court). The Georgia law represented that state's attempt to address the problems the United States Supreme Court previously identified in *Furman v. Georgia*, 408 U.S. 238 (1972), which invalidated all then-existing American death penalty statutes. *See Gregg v. Georgia*, 428 U.S. 153, 169, 196 (1976).

In five opinions, the *Furman* majority found that the death penalty was imposed in only a fraction of cases in which it was legally available and without any identifiable rational basis to explain the drastic disparity—that of life or death—between punishments. The absence of any discernable guidelines for jurors to render their decision effectively established a lottery system as a means of determining who lived or died. *Furman*, 408 U.S. at 293 (Brennan, J., concurring)

("When the punishment of death is inflicted in a trivial number of the cases in which it is legally available, the conclusion is virtually inescapable that it is being inflicted arbitrarily. Indeed, it smacks of little more than a lottery system."). Recognizing the death penalty's profound gravity and ultimate finality, the Court determined that all state capital punishment systems created a constitutionally unacceptable risk of rendering arbitrary and capricious sentences. *See Gregg*, 428 U.S. at 188 (explaining that *Furman* held the penalty "could not be imposed under sentencing procedures that created a substantial risk that it would be inflicted in an arbitrary and capricious manner").

Underlying *Furman* was a broader concern that without adequate procedural safeguards in place to guide their decisions, jurors had complete and unguided discretion to decide whether a defendant should receive the death penalty or life in prison. This unchecked, and at the time essentially unreviewable, authority invited jurors to render decisions for odious reasons including racial and class discrimination which courts were effectively powerless to police.

In response, state legislatures set out to create new capital sentencing schemes that would satisfy the Eighth Amendment. Two very different statutory categories emerged: mandatory death penalty statues and guided discretion statutes. While both were intended to reduce the discretion afforded to juries, the mandatory statutes did so by eliminating it entirely. If a defendant was found guilty of a capital offense, the death penalty was the only available sentence as a matter of law.[7]

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[7] Notably, South Carolina adopted a mandatory death penalty scheme. While the scheme eliminated jury discretion, mandatory sentencing also opened the door for a different shortcoming by effectively erasing the judiciary's role as a co-equal branch to check arbitrary and capricious sentencing. *See Woodson v. North Carolina*, 428 U.S. 280, 303 (1976) (finding a mandatory death penalty scheme removed the ability of the judiciary "to check arbitrary and capricious exercise of [prosecutorial charging] power through a review of death sentences"). In the wake of *Woodson,* South Carolina's scheme was struck down. *See State v. Rumsey*, 267 S.C. 236, 239, 226 S.E.2d

Conversely, the guided discretion statutes implemented bifurcated trials, the consideration of established statutory aggravating and mitigating circumstances, and mandatory appellate review often with proportionality review. Four years after *Furman*, the new laws were back before the Supreme Court, and only the guided discretion statutes were found to satisfy the Eighth Amendment. *Gregg*, 428 U.S. at 195 (upholding Georgia's death penalty statute because the jury's discretion is controlled with clear objectives to implement non-discriminatory application); *Woodson*, 428 U.S. at 302 (finding a mandatory sentence eliminated the jury's essential role and only "papered over" unguided and unchecked discretion).

Specifically, the Court found Georgia's statute constitutional because the jury's discretion was "controlled by clear and objective standards so as to produce non-discriminatory application." *Gregg*, 428 U.S. at 197–98 (quoting *Coley v. State*, 204 S.E.2d 612, 615 (Ga. 1974)). The new scheme did so by bifurcating the issues of guilt or innocence and life or death, asking the jury first to decide the question of legal responsibility and only later asking it to consider the defendant's history, character, family, and other details that would inform jurors' individualized moral decision about penalty selection.

On the back end, and most relevant for present purposes, the Georgia statute also mandated appellate review of all cases where the death penalty was imposed. *Id.* at 198. The Court emphasized the importance of appellate review as an "additional safeguard." *Id.* Noting the Georgia Supreme Court was statutorily required "to review each sentence of death and determine whether it was imposed under the influence of passion or prejudice, whether the evidence supports

894, 895 (1976) (holding that because the mandatory death penalty scheme prohibits controlled discretion in imposing the death penalty the statute was unconstitutional).

the jury's finding of a statutory aggravating circumstance, and whether the sentence is disproportionate compared to those sentences imposed in similar cases." *Id.*

After this State's mandatory death penalty statute was deemed deficient, the General Assembly passed the current death penalty statute. *See* 1977 Act No. 177 § 1. This Court upheld the new statute on the grounds that South Carolina's statute was "indistinguishable" from the statute approved in *Gregg*. *Shaw*, 273 S.C. at 203, 255 S.E.2d at 803–04. The Court noted that the aims of the statute are to ensure that sentencing is "'directed and limited'" per the *Furman* standard so there would be a "more consistent and rational manner" and a "meaningful basis" to distinguish cases in which the death penalty was imposed compared to those in which it was not. *Id.* at 202–03, 255 S.E.2d at 803 (quoting *Gregg*, 428 U.S. at 188–89).

In addressing its statutory responsibility for the first time, the Court explained, "[a]s an additional check against the random imposition of the death penalty, this Court is directed to determine whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." *Id.* at 211, 255 S.E.2d at 807. To make this determination in Joseph Shaw's case, the Court reviewed death sentences that had been imposed in all prior cases under the new statute and was satisfied that there were no similar cases that could be relied upon. *Id.* Significantly, the Court recognized the process was in its infancy and that over time the universe of cases for comparison would increase, highlighting the comparative function envisioned by the Court for proportionality review. *Id.*

Four years later, the Court again considered its statutory obligation in *State v. Copeland*, and, in doing so, took the first step that ultimately doomed its vitality. 278 S.C. 572, 300 S.E.2d 63 (1982). After first concluding that the United State Supreme Court did not "mandate any mode

of appellate review" and thus that "the contours of proportionality review . . . have been left to state determinations," the Court held:

> the search for "similar cases" can only begin with an actual conviction and sentence of death rendered by a trier of fact in accordance with § 16-3-20 of the Code. We consider such findings by the trial court to be a threshold requirement for comparative study and indeed the only foundation of "similarity" consonant with our role as an appellate court.

Id. at 591, 300 S.E.2d at 74.

Despite acknowledging that other states did not rely on such a limited set of cases, this Court limited the pool of cases to those in which a death sentence had been imposed on the belief that expanding the universe of cases would "entail intolerable speculation" by requiring the Court to "enter a realm of pure conjecture if it attempted to compare and contrast [sentences other than death] with an actual sentence of death." *Id.* This was true, the Court reasoned, because sentences other than death "represent acts of mercy which have not yet been held to offend the United States Constitution." *Id.* Thus, the Court concluded, "proportionality review in South Carolina is first and foremost directed to the particular circumstances of a crime and the specific character of the defendants. Comparative review will be thereafter undertaken if possible." *Id.* at 595, 300 S.E.2d at 77.

Despite *Copeland* confining the pool to cases where death had been imposed, the Court initially remained faithful in fulfilling its statutory obligation. For example, in *State v. Butler*, the Court affirmed a sentence of death, finding no legal error and no excessiveness because the defendant "maliciously and purposefully" committed a "brutal" murder and rape. 277 S.C. 452, 458, 290 S.E.2d 1, 4 (1982). The same year, in *State v. Woomer*, a case involving multiple murders, robberies and rapes, the Court found the death sentence not to be excessive or disproportionate because the facts revealed a "chilling picture of ruthless criminality." 278 S.C.

468, 475, 299 S.E.2d 317, 321 (1982). Similarly, in *State v. Plath*, the Court characterized the murder as a "killing of incomprehensible savagery" and noted "the atrocious nature" of the murder. 281 S.C. 1, 20, 313 S.E.2d 619, 630 (1984).

These early decisions reflect the Court's perspective that the death penalty was, and should be, reserved for the "worst of the worst," as opposed to the "average murderer." *See generally*, *Roper v. Simmons*, 543 U.S. 551 (2005); *see also State v. Adams*, 279 S.C. 228, 242, 306 S.E.2d 208, 216 (1983) (affirming a death sentence as proportionate where the Court concluded "it would be difficult to conceive of a crime more heinous"). For example, in *State v. Adams*, a case involving the abduction of a disabled child, this Court said:

> Cases tried in this state under the death penalty statute resulting in capital punishment heretofore, involved factual situations and accused persons similarly atrocious to those involved in this case. It is our observation that a unanimous jury in South Carolina has ordered the death penalty in only those cases where the proof of facts is virtually undebatable and the nature of the wrongful killing is such as to shake the conscience of the community.

279 S.C. at 241, 306 S.E.2d at 215. This principle that death sentences should be limited to "atrocious" cases where the facts are "undebatable" and that shock the conscience of the community was reiterated in other cases in the same era. *E.g.*, *State v. Chaffee*, 285 S.C. 21, 35–36, 328 S.E.2d 464, 472 (1984) (death sentence was not excessive or disproportionate where two men broke into the home of an elderly widow, sexually assaulted her, strangled her to death, and set fire to her home); *State v. Gaskins*, 284 S.C. 105, 112, 130, 326 S.E.2d 132, 137, 146 (1985) (finding death sentence was not excessive or disproportionate where defendant, serving a life sentence for committing multiple murders, killed a death-sentenced inmate with an explosive device as part of a contract killing).

However, as the years passed, the number of statutory aggravating circumstances expanded, making more murders eligible for the death penalty and, consequently, more death

sentences were imposed in this State. In the process, the Court drifted away from reviewing cases for atrociousness, clear evidence of guilt, and crimes shocking to the community's conscience. Instead, it began to look for cases involving the same aggravating circumstances or used some other unexplained matrix for identifying similar cases. In turn, the proportionality analysis became more and more truncated often involving boilerplate language and a string cite with two to five cases.[8]

The crux of this history, however, rests in the fact that in the roughly forty-four years since the current death penalty statute has been in place, this Court has reviewed 220 death penalty cases on direct appeal. No case has ever been found to be disproportionate.

II. MOORE'S DEATH SENTENCE IS DISPROPORTIONATE.

Allowing Moore's execution in this case where the undisputed facts show he entered the store without a gun and both he and Mahoney were shot by guns initially in Mahoney's possession would result in a grossly disproportionate application of the death penalty and would "constitute[] a denial of fundamental fairness shocking to the universal sense of justice." *Butler*, 302 S.C. at 468, 397 S.E.2d at 88.

As set forth below, counsel has identified and collected data relevant to Moore's case and assessed the data under the Court's expressed proportionality framework—examining the particular circumstances of the case and the character of the defendant—under four distinct comparison methods. No matter how it is viewed—under this Court's precedent at the time of

[8] *E.g.*, *State v. Blackwell*, 420 S.C. 127, 168, 801 S.E.2d 713, 735 (2017); *State v. Simmons*, 360 S.C. 33, 46, 599 S.E.2d 448, 454 (2004); *State v. Hill*, 331 S.C. 94,105–06, 501 S.E.2d 122, 128 (1998); *State v. Ivey*, 331 S.C. 118, 124, 502 S.E.2d 92, 95 (1998); *State v. Hudgins*, 319 S.C. 233, 239, 460 S.E.2d 388, 391–92 (1995); *State v. Elkins*, 312 S.C. 541, 545, 436 S.E.2d 178, 180 (1993); *State v. Sims*, 304 S.C. 409, 424, 405 S.E.2d 377, 385 (1991); *State v. Green*, 301 S.C. 347, 360, 392 S.E.2d 157, 154 (1990); *State v. Bell*, 293 S.C. 360, 405 S.E.2d 706, 714 (1987).

Moore's direct appeal or in comparison to a different pool—Moore's sentence is disproportionate to his offense. To avoid this fundamental unfairness, this Court should grant habeas relief and vacate Moore's death sentence.

A. Based on this Court's Precedent Moore's Death Sentence Is Excessive and Disproportionate.

Faithful consideration of the facts underlying Moore's conviction and meaningful comparative proportionality review should have resulted in a finding that Moore's death sentence was disproportionate. The prior Court failed to adequately conduct this review under the *Copeland/Adams* standard. *Copeland*, 278 S.C. at 595, 300 S.E.2d at 77 ("[P]roportionality review in South Carolina is first and foremost directed to the particular circumstances of the crime and the specific character of the defendants. Comparative review will be thereafter undertaken if possible.").

Turning to the circumstances of this case, the direct appeal opinion failed to account for the fact that Moore did not bring a gun into the store or that it was unclear if he initially intended to rob the store. *See Moore*, 357 S.C. at 460–61, 593 S.E.2d at 609–10. This demonstrates that, even if Moore's intent was to commit a robbery as the State alleged at trial, Moore did not enter the store intending to commit murder, or even anticipating that a killing was the possible outcome of his robbery. This alone distinguishes Moore's case from cases characterized by this Court as "atrocious" with "virtually undebatable" facts that "shake the conscience of the community," and thereby warrant death. *See Adams*, 279 S.C. at 241–42, 306 S.E.2d at 216 (finding a death sentence proportionate where the defendant "broke into the residence of his victim through force, lay in wait for his victim's arrival, took him from his home, strangled him to death, and hid his body under brush—all for the purposes of attempting to extort money from the victim's parents" and recognizing "[i]t would be difficult to conceive of a crime more heinous"). Here, the facts are

debatable as to what started the confrontation between Moore and Mahoney, but they tend to show that Mahoney initially introduced the firearms into his struggle with Moore as opposed to a cold blood killing. Thus, unlike the cases where this Court found the death penalty proportional for "maliciously and purposefully . . . brutal"[9] murders with "incomprehensible savagery"[10] that painted a "chilling picture of ruthless criminality,"[11] Moore's case is one in which the death penalty is excessive.

Likewise, the Court's 2004 comparative review failed to fulfill the statutory requirement of reviewing similar cases. The cases relied on by the Court appear to be selected based solely on similar aggravating circumstances of armed robbery: *State v. Simpson*, 325 S.C. 37, 479 S.E.2d 57; *State v. George*, 323 S.C. 496, 476 S.E.2d 903; *State v. Sims*, 304 S.C. 409, 405 S.E.2d 377; and *State v. Patterson*, 285 S.C. 5, 327 S.E.2d 650. *Moore*, 357 S.C. at 465–66, 593 S.E.2d at 612. However, even a brief review of the circumstances underlying the crimes in the comparison cases demonstrate they are more aggravated than Moore's case and do not support a finding of proportionality here.

State v. Simpson: Keith Simpson's 1993 death sentence stemmed from his conviction for robbing a convenience store and killing the store's owner, but there the similarities to Moore's

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[9] *Butler*, 277 S.C. at 458, 290 S.E.2d at 4 (finding a death sentence proportional where the defendant "maliciously and purposefully committed a brutal murder accompanied by rape").

[10] *Plath*, 281 S.C. at 20, 313 S.E.2d at 630 (finding a death sentence proportional where the defendant and accomplices picked up a hitchhiker, brought her to a garbage dump where she was forced to perform sexual acts before they carved "KKK" into her body, and beat and stabbed her to death).

[11] *Woomer*, 278 S.C. at 475, 299 S.E.2d at 321(finding a death sentence proportional where the defendant "and his accomplice entered a small convenience store and, brandishing a shotgun and pistol" in front of small children, and drove the two victims "to a nearby woods where they were raped" and made "the object of [the defendant's] brutal gratification which included perverted acts and demands" before both victims were shot, one of whom survived).

case end. First, the most obvious difference is that Simpson went into the store with a gun and the clear intention of committing a robbery, thereby demonstrating a much greater degree of reckless indifference to the value of human life. Second, Simpson's behavior during the crime demonstrated his wanton disregard for human life: he pointed his gun at a nine-year-old child's head and (unsuccessfully) attempted to fire it, then fired at random at people in the parking lot while he and his codefendant drove away after murdering the store owner. *Simpson*, 367 S.C. at 593–94, 627 S.E.2d at 704–05. Third, more harm was done in Simpson's case. Specifically, Simpson traumatized the child, killed the store owner, and pointed his gun at five people, while his codefendant grievously wounded the child's father by shooting him in the neck and arm. *Id.* at 594, 627 S.E.2d at 705; *see also* JA 1400–01. But most importantly, Simpson's crime was preceded by a statement earlier in the day that evidenced both premeditated intent to kill and racial motivation: Simpson said that he was going to rob the store, and that he "had not killed a white man today." *See* John H. Blume & Sheri Lynn Johnson, *Back to a Future: Reversing Keith Simpson's Death Sentence and Making Peace with the Victim's Family through Post-conviction Investigation*, 77 U.M.K.C. L. Rev. 963, 964 (2009).

Moreover, since the time of Moore's direct appeal, Simpson's sentence was overturned in state post-conviction proceedings after this Court found that Solicitor Gossett's office had unconstitutionally withheld exculpatory, material evidence. *Simpson v. Moore*, 367 S.C. at 600, 627 S.E.2d at 708. On remand, Simpson was resentenced to life with parole eligibility in 2022.[12]

[12] Though the direct appeal Court could not have known this comparison case (and two others) would be reversed, the fact that these more aggravated cases ultimately resulted in sentences of less than death is relevant to this Court's habeas review. As discussed in Section II. B., the vast majority of single-victim business robbery-murder cases do not result in execution, demonstrating that these types of cases are not ones that "shake the conscience of the community" sufficiently to warrant the ultimate punishment. *See Adams*, 279 S.C. at 241, 306 S.E.2d at 215. These reversals, therefore, counsel in favor of vacating Moore's death sentence to avoid the fundamental unfairness

State v. George: Ricky George was sentenced to death in Horry County in 1994 for his participation in the robbery of a convenience store and the shooting death of its owner. Other than sharing the aggravating factor of armed robbery, George's crime bears no particular resemblance to Moore's. George and two codefendants—both of whom were convicted of murder and sentenced to life imprisonment—planned to rob a convenience store in Horry County. *See George*, 323 S.C. at 501, 476 S.E.2d at 906. George and one codefendant, armed with guns, entered the store, where the owner was working with his six-year-old grandson. While the boy watched, George shot the owner three times and robbed him of $200 or $300, and George and the two codefendants fled in a getaway van. *See* JA 1402. Additionally, evidence presented at the penalty phase of George's trial tended to show that on the day after killing the store owner in Horry County, George was involved in the robbery and murder of a gas station store clerk in Clarendon County. *Id.* at 511, n.7, 476 S.E. 2d at 912, n.7. Thus, apart from whatever degree of similarity exists between Moore's crime and George's first murder/armed robbery, George's involvement in another robbery that resulted in the death of another convenience store employee the next day shows the cases are not, in fact, similar making comparison for proportionality review inappropriate. Finally, as was the case with Simpson, George's death sentence was vacated (pursuant to *Atkins v. Virginia*, 536 U.S. 304 (2002)) and George was resentenced to life imprisonment with parole eligibility in 2025.

State v. Patterson: Wardell Patterson was sentenced to death in York County in 1980 for his participation in the armed robbery of a convenience store and the shooting death of an employee. As this Court noted, Patterson shot the victim "in cold blood for pecuniary gain" and

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of an carrying out an execution in the type of case the most often results in a sentence of life or less.

"[t]he victim's autopsy revealed 30 to 40 pellet wounds to the head in addition to the one by two inch hole" in the "back of his skull" that caused the victim's death, facts certainly evidencing a greater degree of deliberation, intent to kill, and callousness than in Moore's case. *See Patterson*, 285 S.C. at 8, 12, 327 S.E.2d at 651, 654. Nonetheless, his death sentence was vacated in 1987 by the United States Supreme Court. *See Patterson v. Aiken*, 480 U.S. 943 (holding that Patterson should not been prevented from presenting evidence of prison adaptability in sentencing). Patterson, like Simpson and George, was resentenced to life imprisonment. *Man sentenced 3rd time, gets life*, The Item, Jan. 25, 1988, at 5A. He is currently eligible for parole.

State v. Sims: The circumstances of the offense in Mitchell Sims's case bear no relationship to Moore's case, making it particularly inappropriate for comparative review. Sims murdered two people in South Carolina in the course of a premeditated robbery-murder. He knew the victims, as he worked with them at a Domino's Pizza in Berkeley County. The evidence established that Sims tied up the two employees, shot them execution style, and then robbed the store. *Sims*, 304 S.C. at 413–14, 405 S.E. 2d at 380. Furthermore, the evidence at the penalty phase of Sims' trial established that he had previously been convicted in California of killing a Domino's Pizza delivery worker, whose body was found "hog-tied" and "submerged" in a bathtub in a hotel room to which Sims had lured him. "A washcloth had been stuffed in his mouth and a pillowcase tied over his head." Stephanie O'Neill, *Trial Begins in Killing of Pizza Deliveryman: Slaying 'Meticulously Planned,' Jury Told*, L.A. Times, Apr. 30, 1987, at G2. When asked about the incident by police, Sims stated, "I had to kill that boy . . . I didn't want him to identify me." *Sims*, 304 S.C. at 421, 405 S. E.2d at 384. In the same trial, Sims was also convicted of attempting to murder two other Domino's employees by tying them up and leaving them in a freezer at a Domino's store. *See Sims v. Brown*, 425 F.3d 560, 562 (9th Cir. 2005). Thus, Sims's South

Carolina crime—a premeditated double homicide—was wildly different and more aggravated than Moore's. Sims's case is not remotely similar to Moore's and offers no support for a determination that Moore's death sentence was proportional.[13]

In sum, an aggravating circumstance with a factually similar thread like a robbery at a place of business is not enough to demonstrate proportionality in Moore's case. Absent from Moore's case are premeditation, possession of a firearm prior to the homicide, clear evidence of intent to kill, or the general level of moral culpability in the aforementioned cases. Because the comparison cases relied on by the Court on direct appeal are not actually comparable, they do not support a finding of proportionality.

B. Moore's Sentence Is Disproportionate Compared to All Post-1977 Cases Resulting in a Death Sentence.

Even if the Court had expanded its comparative analysis to all other cases in which a death sentence was imposed between 1977 and its direct appeal review in 2004, none of those cases demonstrate a death sentence is proportional in Moore's case. Of the 155 people sentenced to death prior to 2004, fifty-two were sentenced for killing more than one victim, unlike Moore. *See* Supplemental Appendix.[14] Of the cases resulting in a death sentence based on the death of a single

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[13] Sims's sentence has not yet been set aside, and he is currently incarcerated on California's death row at San Quentin.

[14] The Supplemental Appendix contains a list of cases in which the solicitor filed a notice of intent to seek the death penalty, regardless of the ultimate sentencing outcome, with relevant case information, such as the facts of the offense and the ultimate case outcome. The list was compiled by reference to orders from the Chief Justice of this Court vesting jurisdiction in a specific circuit court judge upon receipt of a notice of intent to seek the death penalty obtained from the Office of Court Administration. This list was supplemented by counsel's searches of legal databases for published opinions that referenced death sentences or death notices in South Carolina. Where possible, the sources for the Supplemental Appendix are those published opinions. Counsel identified additional death-noticed cases by searching archived newspaper articles and other contemporaneous news reports. Finally, counsel obtained and confirmed information about the race and gender of the defendants and victims through publicly available information, including social security documents; documents from veterans' agencies; published obituaries; and other

person, only eighteen cases pre-2004 (excluding Moore's) involved a robbery of a place of business.[15]

Those eighteen cases could be considered "similar" to Moore's but for the fact that evidence in each demonstrates a clear intent to commit a robbery and the intent to commit murder or (at least) knowledge that death might result from use of a deadly weapon brought by the defendant into the place of business. Additionally, three of those cases involved abduction, rape, and/or torture of the victim prior to the killing, unlike Moore's.[16]

Notably, most of the death sentences imposed based on a business robbery resulting in the death of a single victim were reversed and ultimately ended in a sentence less than death as opposed to an execution.[17] Only four people have been executed for such a crime, one of whom

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similarly reliable sources. A guide to the Supplemental Appendix, with explanations for each variable listed, appears on the first page.

[15] The nineteen other cases are (with original sentencing year, the ultimate result of their sentence): (1) Larry Gilbert (1977, executed); (2) J.D. Gleaton (1977, executed); (3) Wardell Patterson (1980, reversal, life trial on remand); (4) Albert "Bo" Thompson (1980, reversal, life trial on remand); (5) James Anthony Butler (1981, reversal, life trial on remand); (6) Dale Roberts Yates (1981, reversal, life sentence on remand); (7) Stanley Eugene Woods (1983, reversal, life trial on remand); (8) Leroy Drayton (1984, executed); (9) Mose Peterson III (1984, reversal, life trial on remand); (10) Craig Anthony Stubbs (1984, reversal, life trial on remand); (11) Jerry Lee Reed (1986, reversal, life sentence on remand); (12) Floyd West (1986, died on death row); (13) Shawn Humphries (1994, executed); (14) Keith Simpson (1994, reversal, life sentence on remand); (15) Herman Hughes (1995, reversal, life sentence on remand); (16) Roger Dale Johnson (1996, died on death row); (17) William Arthur Kelly (1998, reversal, life sentence on remand); and (18) Wesley Aaron Shafer (1998, reversal, life trial on remand). One additional person, Eric Dale Morgan, was sentenced to death for a single-victim case involving the armed robbery of a business post-2004, but his sentence was also reduced. *See State v. Morgan*, 367 S.C. 615, 626 S.E.2d 888 (2006). The specific facts of each of these cases can be found in the Supplemental Appendix and are discussed in the pages that follow, broken down according to their ultimate sentencing outcome.

[16] Stanley Eugene Woods (charged with kidnapping and raping the store clerk in her car); Leroy Drayton (charged with abducting the cashier at gunpoint before killing her on a pier); Roger Dale Johnson (charged with abducting a restaurant employee at knifepoint prior to killing her).

[17] Nine of those reversals occurred prior to this Court's review of Moore's case on direct appeal in 2004. *See Patterson v. Aiken*, 480 U.S. 943; *Yates v. Evatt*, 500 U.S. 391 (1991); *State v. (James)*

abducted the employee from the store prior to killing her in cold blood (Drayton), and in all four cases, there was clear evidence the men entered the store with a gun and/or knife and used the weapon to rob the store and kill the employee. A more detailed summary of the facts of each of these executions appears in the chart below:

Executions in Cases Roughly Comparable to Moore's Case

	Sentencing year, Execution year	**Relevant facts**
Larry Gilbert & J.D. Gleaton	1977, 1998	On July 12, 1977, brothers Larry Gilbert and J.D. Gleaton spent the morning looking for and possibly using drugs. Later in the day, they went into a service station armed with a gun and a knife, robbed the operator, and stole $200. Testimony at their joint trial indicated that after Gleaton stabbed the victim several times, Gilbert shot him as he lay helpless on the floor, and one of the brothers laughed at the victim as he died in agony. Gilbert and Gleaton were tried together, and their jury found the aggravating circumstance of robbery. *See State v. Gilbert*, 273 S.C. 690, 258 S.E.2d 890 (1979), *abrogated by Torrence*, 305 S.C. 45, 406 S.E.2d 315; *Copeland*, 278 S.C. 572, 593, 300 S.E.2d 63, 75.
Leroy Drayton	1984, 1999	Sometime after 1:30 AM on February 11, 1984, Drayton, who was on parole for armed robbery, entered a convenience store armed with a .357 magnum pistol and abducted the woman working there. He brought her to a secluded area by a river and shot her in the head at close range, killing her. Testimony at Drayton's trial indicated that after the victim's lifeless body fell from the pier, Drayton placed stolen license plates on her car and fled to New York City, where he sold the car and disposed of the gun. The jury found the aggravating circumstances of kidnapping and armed robbery. *See State v. Drayton*, 293 S.C. 417, 361 S.E.2d 329 (1987).
Shawn Humphries	1994, 2005	On New Year's Eve of 1993, Shawn Humphries and a friend stayed up all night drinking beer and driving around Greenville. At some point during the night, the two men stole a gun. The next

Butler, 277 S.C. 543, 290 S.E.2d 420 (1982); *State v. Woods*, 282 S.C. 18, 316 S.E.2d 673 (1984); *Thompson v. Aiken*, 281 S.C. 239 (1984); *State v. Peterson*, 287 S.C. 244, 335 S.E.2d 800 (1985) (vacating the convictions and sentences of Mose Peterson, III and Craig Anthony Stubbs); *State v. Reed*, 293 S.C. 515, 362 S.E.2d 13 (1987); *State v. Shafer*, 352 S.C. 191, 573 S.E.2d 796 (2002).

morning, around 7:00 AM, Humphries went into a convenience store armed with the gun. When the convenience store employee asked if Humphries wanted something hot, he flashed the gun and demanded money. The employee began to reach under the counter, but Humphries fired a shot at the employee, striking him in the head and killing him. Humphries fled the store. He was convicted of murder, and the jury found the aggravating circumstance of armed robbery. *State v. Humphries*, 325 S.C. 28, 479 S.E.2d 52 (1997).

The forty-three men who have been executed since South Carolina's death penalty statute went into effect with a description of the offenses for which they were executed appears in the first pages of the Supplemental Appendix. In total, only nineteen of the executions were in cases involving a single murder victim (including the four described in the above chart).[18] The remaining fifteen cases resulting in execution are distinguishable from Moore's case because: juries in two cases found the aggravating circumstance of criminal sexual conduct,[19] juries in two others found the aggravating circumstance of murder of a law enforcement officer,[20] three involved armed robberies of victims in parking lots where the defendant used his own gun to effect the robbery and murder of unarmed victims,[21] three involved the kidnapping or luring of the victim before their

[18] In addition to the twenty-four multiple-victim cases that ended in executions, solicitors have issued death notices in 126 cases with more than one victim. *See* Supp. App. The death notice was withdrawn in forty of those cases; four defendants were either acquitted at trial or have since been released from prison; twenty cases were reversed at some stage of appeal and the defendant was resentenced to life or less by agreement or court order; thirteen cases went to trial and received life verdicts from a judge or jury (including cases on remand after a reversal); and twenty-one defendants remain on death row. Moore's case is, by any objective measure, less aggravated than all 126 multi-victim cases.

[19] Louis J. Truesdale (executed in 1998) and Joseph Gardner (executed in 2008).

[20] Robert South (executed in 1996 after waiving appeals) and David Clayton Hill (executed in 2004).

[21] Earl Matthews (executed in 1997), Kevin Dean Young (executed in 2000), and Anthony Green (executed in 2002).

death,[22] two involved breaking into and killing someone in their own home,[23] one involved the torture and killing of a child under the age of eleven,[24] and two involved attempted sexual assault.[25]

Simply put, Moore's case is less aggravated than each of these, and in this Court's own words, "[f]rom a logical standpoint, of course, that which is unique is also incommensurable." *Copeland*, 278 S.C. at 587, 300 S.E.2d at 72. If this Court permits Moore's execution, he will be in a class of one, compared to the other forty-three executed men in South Carolina's modern death penalty history. His sentence is excessive and disproportionate.

C. Moore's Sentence Is Disproportionate Compared to Similar Armed Robbery Cases that Did Not Ultimately Result in a Death Sentence.

Looking beyond this Court's current precedent and reviewing cases in which the death penalty was sought but not ultimately imposed demonstrates that Moore's case is even more glaringly excessive and disproportionate when it is compared to all other cases involving armed robberies of stores where a solicitor issued a death notice, regardless of the ultimate sentence. Overall, since 1977, 68 men other than Moore have received death notices for armed robberies of businesses similar to Nikki's.[26] Of those, 51 were single-victim cases.[27]

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[22] Michael Elkins (executed in 1997 after waiving appeals), Ronnie Howard (executed in 1999), and Calvin A. Shuler (executed in 2007).

[23] Sylvester Adams (executed in 1995) and Jason Byram (executed in 2004).

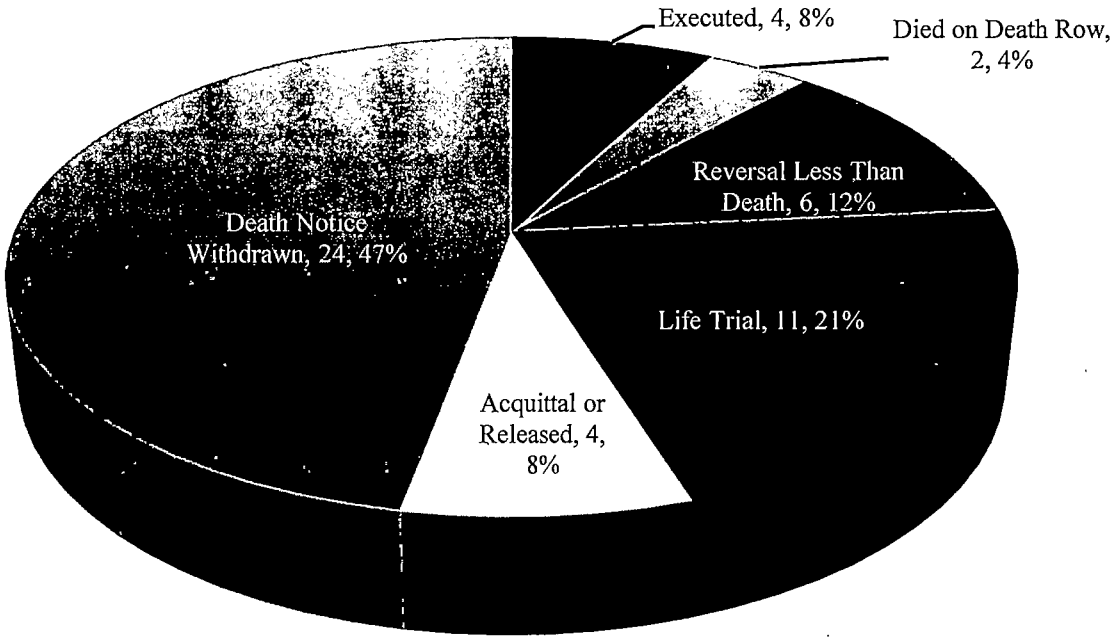
[24] Michael J. Passaro (executed in 2002 after waiving appeals).

[25] John Plath and John Arnold (executed in 1998).

[26] For the purpose of comparison, the list of "businesses similar to Nikki's" includes convenience stores; grocery stores; pawn shops; hotels and motels; restaurants; video poker or gambling stores; and other rural stores.

[27] Of the 53 single-victim cases involving armed robberies of businesses, 68% of the defendants were black and 32% of the defendants were white. For the 51 cases where victim race is known, all but seven of the victims were white, meaning the overwhelming majority, 86%, of all armed robbery cases in this category involved white victims.

The outcomes of the single-victim business armed robbery cases are shown below:



Moore's case is the single case currently pending involving this set of facts.[28] Four of the fifty-one men in the single victim category were either acquitted at trial or have been released from prison, and two men died on death row before their cases became final. Of the remaining cases, Moore's case is categorically unlike the death cases and is more like the cases in which prosecutors withdrew death notices.

- *Reversal Less Than Death*: Six men were sentenced to death but later had their sentences reversed on appeal or in post-conviction or federal habeas proceedings and were

[28] The five other pending cases with armed robbery as an aggravator all involved multiple victims. *See* Supp. App.

resentenced to life without parole upon agreement or court order. The facts of their cases are as follows[29]:

Single Victim Murder-Armed Robbery of Business Cases Where a Death Sentence Was Reversed Without a New Death Penalty Proceeding & Imposition of a Sentence of Life or Less

	Death sentence year	**Outcome**	**Relevant facts**
Dale Roberts Yates	1981	Reversed by the SCOTUS and accepted a plea to life	With two codefendants, Yates drove around looking for stores to rob for two days before settling on a rural store owned by the victim. Yates entered the store armed with a gun, while a codefendant was armed with a knife. They demanded and received approximately $3,000 from the victim, but when the victim did not cooperate to Yates' satisfaction, Yates shot him, though not fatally. This drew the attention of the victim's mother, who came upon the scene. The codefendant stabbed her to death, and the victim obtained a gun and shot the codefendant. Yates escaped with the money and gun.
Jerry Lee Reed	1986	Reversed on direct appeal and accepted a plea to life	Reed entered a general store and followed the 67-year-old owner to the back, ostensibly so the owner could slice some deli meat. Reed grabbed a butcher knife and stabbed the man in the neck twice, and when the man fell onto a counter, Reed shot him in the chest and between the eyes. Reed and his girlfriend then fled with money from the store and used it to pay bills. After Reed's death sentence was vacated, he was again noticed with the death penalty but took a guilty plea.
Keith L. Simpson	1994	Reversed in state post-conviction and resentenced to life	Simpson was convicted of robbing a convenience store and killing the store's owner. During the crime, he pointed his gun at a nine-year-old child's head and (unsuccessfully) attempted to fire it, then fired at random at people in the parking lot while he and his codefendant drove away after murdering the store owner. Earlier in the day, Simpson said that he was going to rob the

[29] The information in this table is drawn from the cases referenced in Supplemental Appendix and the cases cited therein.

			store, and that he "had not killed a white man today."
Herman Hughes	1995	Resentenced to life as a result of *Roper v. Simmons*	With a codefendant, Hughes robbed a video poker parlor. When the attendant opened the cash register and handed over his car keys, Hughes shot him in the head. Hughes then shot the victim's girlfriend in the chest and head and shot the victim in the head again two times. Hughes and his codefendant stole the victim's car and the money from the cash drawer. The girlfriend survived.
William Arthur Kelly	1996	Resentenced to life as a result of *Roper v. Simmons*	Kelly, who previously worked at the KFC, robbed the KFC around closing and killed the manager. The victim was stabbed thirty-one times and her neck was cut from ear to ear. She bled to death. At the time of her death, she was twenty-three weeks pregnant.
Eric Dale Morgan	2004	Resentenced to life as a result of *Roper v. Simmons*	With a codefendant present, Morgan shot a convenience store employee in the head at closing and stole the bag the victim was carrying that contained more than $7,000. Originally, Morgan and his codefendant planned to blow a hole in the store's back wall with a pipe bomb afterhours. .

- *Life trials*: Eleven men with a single victim murder with an armed robbery of a business were sentenced to life imprisonment following a capital sentencing proceeding at which either a judge or jury determined that a death sentence was not appropriate:

Single Victim Murder-Armed Robbery of Business
Cases Where the Judge or Jury Imposed a Life Sentence[30]

	Year of trial(s)	**Outcome**	**Relevant facts**
Albert "Bo" Thompson	1980, 1984	Reversed in state post-conviction and sentenced to life at a bench trial on remand	With two codefendants, Thompson robbed a grocery store and shot the owner twice—the second time at close range. Thompson acted largely alone, killing the clerk after his codefendants left, and testimony at his trial indicated t

[30] A portion of these trials are new trials or sentencing hearings that were the result of a conviction and/or sentence being reversed.

			he had made clear earlier in the day his intention to rob a store.
Wardell Patterson	1980, 1983, 1985	Reversed on direct appeal. Sentenced to death on retrial. Reversed in post-conviction by the SCOTUS. Sentenced to life by a jury.	The facts of Patterson's case are described in detail in Section II.A., *supra*. Patterson shot a convenience store clerk in the head with a shotgun and robbed the store before fleeing with his codefendants.
James Anthony Butler	1981, 1983	Reversed in state PCR. On remand, Butler was sentenced to life by a jury	Butler entered a motel in Santee in an attempt to rob the business. He shot and killed the owner and severely wounded the owner's wife, who was pregnant at the time.
Stanley Eugene Woods	1983, 1985	Reversed on direct appeal and resentenced to life at a bench trial on remand	Woods shot and killed a gas station attendant with a sawed-off shotgun. At the penalty phase of the trial, the jury was informed that Woods had also been convicted of two counts of kidnapping and rape in in connection with two other incidents involving a convenience store clerk.
Mose Peterson III & Craig Anthony Stubbs	1984, 1986	Reversed on direct appeal and jury deadlocked on penalty at second trial	Peterson and Stubs were convicted of killing an 18-year-old student and part-time employee of a car rental store near the Florence Airport. The victim was found at the car rental agency with his hands bound behind his back and with four gunshot wounds to the head. His wallet and car were missing, and money was missing from the cash drawer.
Gregory Donald Benjamin	1996	Jury life sentence at first trial	Benjamin robbed a video poker parlor and in the process, shot and killed a 27-year-old college student working at the store. After shooting the victim multiple times with a gun he brought to the store, Benjamin took a large sum of cash from the business. He admitted that he entered the store with the intent to rob it and shot the clerk with no warning and no struggle.
Wesley Aaron Shafer	1998, 2004	Reversed by SCOTUS on direct appeal and	Shafer walked into a convenience store and shot the clerk in the head two times, once at point-blank range. He and a codefendant then attempted to steal the

		sentenced to life on retrial	cash register, but when they could not open it, they took two packs of cigarettes.
Eugene Gary	1999	Jury life sentence at first trial	Gary stabbed to death the manager of a sub sandwich station, where he and the victim both worked. Gary subsequently took $1,300 from the register and spent the money at local bars, where bills soaked in the victim's blood were found.
Christopher J. Costa	2001	Jury life sentence at first trial	With a codefendant, Costa planned to rob a video poker parlor after being fired for stealing $17,000 from the machines. To gain entry into the parlor, the men pretended to have car trouble, then shot and killed the security guard on duty.
Tyrone L. Sanders	2001	Jury life sentence at first trial	Sanders and two codefendants shot to death a pawn shop owner during a botched robbery two days before Christmas. Sanders took money and several guns from the store after shooting the victim.

- *Death Notices Withdrawn*: In addition to the seven reversals and ten life trials, there are also 24 cases (nearly half of the fifty-two total single-victim cases involving armed robberies of businesses) in which the prosecution withdrew its notice of intent to seek the death penalty. The facts those cases are detailed in the chart provided in the Supplemental Appendix. The following three cases provide a snapshot. First, Jessie Lee Pringle abducted, raped, and killed a woman from a convenience store where she worked. The victim's body was found beaten to death. Prosecutors offered Pringle a plea to life imprisonment. Second, Fredrico D. Riddley attempted to rob a motel, and in so doing, beat a woman to death with a shovel and a chair. Riddley then fled in a stolen minivan with a second woman inside it. Prosecutors offered Riddley a plea to life imprisonment. Third, Charles William Conner pretended to be a police officer at a convenience store and waited in the store until other customers left before he shot and killed the clerk. He and a

codefendant fled to North Carolina, where they were arrested after they committed another similar robbery. Prosecutors offered Conner a plea to life imprisonment.

In sum, Moore's case has substantially more in common with the pool of men serving sentences of life or less than with the executed men. Like in the cases of many of the life-sentenced men there is a lack of direct evidence about how Moore killed his victim. If execution is allowed to proceed, Moore would be unique compared both to the executed men and the life cases with men who entered the target store unarmed and without evidence of clear intent to commit a robbery. The facts of Moore's offense are not, so "heinous" as to be "*sui generous*, simply beyond comparison." *Copeland*, 278 S.C. at 587, 300 S.E.2d at 72. To the contrary, Moore's case is akin to other crimes involving "a reactive action" taken "in response to the victim[]"—cases which courts, prosecutors, and juries often find do not warrant the death penalty.[31] *See Scott*, 66 So.3d

[31] Moore's case shares a fact pattern in common with a significant number of robbery-murder cases from other jurisdictions where the death sentence was found to be excessive or disproportionate. *E.g.*, *Yacob v. State*, 136 So. 3d 539, 546, 550 (Fla. 2014) (vacating the death sentence based on Florida's well-established precedent that death is generally disproportionate in robbery-gone-bad cases), *abrogated by Lawrence v. State*, 308 So.3d 544 (Fla. 2020); *Scott v. State*, 66 So. 3d 923, 937 (Fla. 2011) (per curiam) (vacating the death sentence in a robbery-gone-bad case because the "murder could be viewed as a reactive action in response to the victim's resistance to the robbery"); *Terry v. State*, 668 So. 2d 954, 965 (Fla. 1996) (vacating the death sentence despite little mitigation and because evidence suggested it was a robbery gone bad case); *State v. Benson*, 372 S.E.2d 517, 523 (N.C. 1988) (vacating a death sentence after noting the vast majority of robbery-murders end with life sentences and of those that end with death sentences, the vast majority involve multiple victims), *abrogated on other grounds by State v. Hooper*, 591 S.E.2d 514 (N.C. 2004).

Concern about the death penalty being disproportionate in robbery-murder cases has been noted by strong death penalty proponents. For example, conservative death penalty scholar and capital punishment advocate Robert Blecker believes the death penalty in robbery-murders should be reserved "for the robber who kills an unresisting victim." Robert Blecker, *Among Killers, Searching For the Worst of the Worst*, Washington Post (Dec. 3, 2000); *see also* Robert Blecker, *The Road Not Considered: Revising New Jersey's Death Penalty Statute*, 32 Seton Hall Legis. J. 241, 245-46 (2008) (claiming the robber who killed a gas station clerk who grabbed a gun does not deserve the same punishment as Charles Ng). And former federal judge and death penalty supporter Alex Kozinski has offered similar reservations about seeking and imposing the death penalty in cases like Moore's. Alex Kozinski & Sean Gallagher, *Death: The Ultimate Run-On*

at 937. But even then, Moore's case is an outlier when compared to the pool of life trials, reversals, and withdrawn death notices, and in this way, his case does not invite "intolerable speculation" or require the Court to "enter a realm of pure conjecture" by comparing the facts of his offense to those in cases that did not result in executions, which further demonstrate Moore's death sentence is excessive and disproportionate. *See Copeland*, 278 S.C. at 591, 300 S.E.2d at 74.

D. Moore's Sentence Is Disproportionate Compared to Various Cases in Which the Solicitor Never Sought Death.

Finally, Moore's sentence is disproportionate when compared to cases that occurred prior to Moore's trial but in which prosecutors never sought the death penalty. Although counsel have not yet compiled a comprehensive list of such cases, a sampling of examples makes the point[32]:

- *State v. Smith*, 375 S.C. 507, 654 S.E.2d 523 (2007), *abrogated by Smalls*, 422 S.C. 174, 810 S.E.2d 836: Smith was convicted, at a jury trial, of shooting and killing a woman and her two-week-old daughter over a disputed drug deal. Smith and his girlfriend, who was also charged, burned the contents of the victim's car and buried their bodies in the woods.
- *State v. Griffin*, 339 S.C. 74, 528 S.E.2d 668 (2000): Griffin and a codefendant made plans to rob and kill a known drug dealer. Griffin called the victim under the pretense of a drug deal. The victim arrived as planned, but with a companion. Griffin took the two victims to a rural area where he shot both of them in the head and stole two bags of marijuana from their car.

Sentence, 46 Case W. Res. L. Rev. 1, 31 (1995) (arguing that an effective death penalty requires reserving it only for "the worst of the very bad—mass murderers, hired killers, terrorists").

[32] The cases below are drawn from a database of individuals in the custody of the South Carolina Department of Corrections (SCDC), maintained by SCDC and provided to counsel for Moore in response to a Freedom of Information Act request.

- *State v. Lynch*, 344 S.C. 635, 545 S.E.2d 511 (2001), *overruled by State v. Gentry*, 363 S.C. 93, 5610 S.E.2d 494 (2005): Lynch entered the home of his former girlfriend in the middle of the night and stabbed her to death, with fatal wounds to the jugular vein and the heart.

Moore's case does not rise to the level of the "worst of the worst" and cannot justify imposition of the ultimate punishment under this Court's precedent. Although there is no requirement to demonstrate the underlying cause of the disproportionate death sentence in this case, the factor that best explains the arbitrary result is race. Moore (a black man) is the last person on death row convicted and sentenced by a jury that did not have even a single member of his own race. He was also charged and convicted of killing a white victim—the race combination with the most disproportionate number of death sentences compared to homicide rates in this State. *See* John H. Blume & Lindsey S. Vann, *Forty Years of Death: The Past, Present, and Future of the Death Penalty in South Carolina (Still Arbitrary After All These Years)*, 11 Duke J. Const. L. & Pub. Pol'y 183, 203 (2016). The then-existing narrow view of similar cases used by this Court on direct appeal failed to correct this error in 2004. Through the habeas lens, this Court has the ability to conduct an adequate proportionality review and correct the error to avoid an execution in violation of fundamental fairness.

III. THIS COURT SHOULD CREATE A MORE MEANINGFUL METHOD OF PROPORTIONALITY REVIEW.

As Moore's case demonstrates, the Court's current method of conducting proportionality review in death penalty cases fails to identify and correct disproportionate sentences on direct review. This case provides an opportunity to refashion proportionality review by utilizing more robust comparison pools to ensure a meaningful review. By considering cases in which the death penalty was not imposed, the Court will be able to provide a more balanced analysis that accounts

for the broad list of statutory aggravating circumstances and prosecutorial charging and bargaining practices, along with the declining use of the death penalty statewide. Doing so will allow proportionality review to fulfill its statutory function as intended by the General Assembly and the *Shaw* Court that initially approved this review. Below are four potential avenues for creating comparison pools.

The first option is to consider all South Carolina homicides. This comparison pool would provide the most, maximally relevant data points. Under such a scheme, a death sentence would be compared to all homicides that occur in this state including murders that are reduced to voluntary manslaughter by jury verdict or plea bargaining.[33] While some additional "infrastructure" would need to be created to compare death sentences to all homicides, much of this type of data is currently maintained by the Office of Indigent Defense, *see* JA 1396–1399, and a similar system has been adopted in at least one other state. *See* La. Sup. Ct. Rules 28, § 905.9.1, sec. 4(b) (requiring district attorneys to prepare memoranda with factual information about every first degree homicide processed in each attorney's jurisdiction and submit those memoranda to a central judicial office). This method would insure the most accurate depiction of cases that generally result in both the death penalty and sentences less than death. The Court would then be able to more accurately make the original assessment called for in its earlier cases that the death penalty should be imposed only in "atrocious" cases that shock the conscience of the community.

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[33] *E.g.*, *State v. Hill*, No. 2008-UP-081, 2008 WL 9832885 (Ct. App. Feb. 6, 2008) (per curiam) (describing a voluntary manslaughter conviction involving a defendant who shot the victim six times at close range, including four shots to the head); *Man convicted of voluntary manslaughter,* GoUpstate.com, Aug. 28, 1999, https://perma.cc/YS2H-5XTJ (describing multiple voluntary manslaughter convictions involving a shotgun shooting of an innocent bystander to a fight in an apartment complex parking lot); Murray Glenn, *Spartanburg man charged with murder after shooting*, GoUpstate.com, July 22, 1998, https://perma.cc/N2X9-FJYN (describing a domestic dispute in which the defendant shot his girlfriend in the head, arms, and legs that ultimately produced a voluntary manslaughter conviction).

A second option is to use a comparison pool that consists of all death-noticed cases, regardless of the outcomes. This information is readily available and little additional infrastructure would need to be created for this pool of cases to be informative and accessible for this Court's proportionality review. Court Administration already tracks death noticed cases because once a Solicitor's Office files a notice of intent to seek the death penalty, the Chief Justice enters an order assigning a circuit judge exclusive jurisdiction over the case. *See* Supp. App. (providing list of death noticed cases derived from Court Administration data). If in addition to this tracking, Court Administration compiled a summary of the underlying facts, by, for example, requiring the Solicitor's Office filing a notice of intent to seek the death penalty to file with the notice a short recitation of the facts of the underlying offense and to subsequently inform Court Administration of the final outcome of the case, the Court would have an ascertainable pool of cases for review.

Such delegation has been achieved in a variety of ways by other court systems. *E.g.*, *Commonwealth v. Frey*, 475 A.2d 700, 707–08 (Pa. 1984) (describing Pennsylvania's tracking method, which requires judges to provide that state's equivalent of court administration with a memorandum about each capital case), *abrogated on other grounds by Commonwealth v. Freeman*, 827 A.2d 385 (Pa. 2003); Ky. Rev. Stat. § 532.075(6) (requiring the Chief Justice of the state supreme court to assign an assistant to compile the pool); La. Sup. Ct. Rules 28, § 905.9.1, sec. 4 (requiring district attorneys to submit memorandums with each capital appeal). Practically, using this pool for comparison would be superior to the present system as it would include cases where an elected Solicitor in this State determined that the death penalty was potentially the appropriate punishment and thus would easily satisfy the statute's "similar cases" mandate.

Third, this Court could establish and utilize a pool of all cases that proceeded to trial as capital cases, including those in which the judge or jury returned a life verdict. *See State v. Robert*,

820 N.W.2d 136, 145 (S.D. 2012); *State v. Addison*, 7 A.3d 1225 (N.H. 2010) (construing "similar cases" to mean those in which there was a capital trial and the jury imposed either a life or death sentence, but acknowledging the practical reality that pre-abolition, New Hampshire had so few capital trials as to require the court to conduct interstate analysis). While using cases that resulted in life or death following a capital trial would not provide as robust a comparison pool, and thus would deprive the Court of access to information regarding a large number of homicides where the death penalty is not sought or, if sought, pursued, it would include cases where a judge or jury decided, acting as the "conscience of the community," that the death penalty was not warranted. For the reasons stated above, this pool of cases could be readily created, as other states have done, using data already maintained by Court Administration and the Office of Indigent Defense.

Finally, this Court could maintain its current "pool" of cases for review but allow a capital defendant to address proportionality on direct appeal, where appropriate, by having trial and appellate counsel supplement the record with additional data they believe is relevant to the proportionality review (much like undersigned counsel did in this case). Thus, trial and appellate counsel could provide this Court with information regarding homicide cases they believe were similar to the case before the Court which did not result in the death penalty. While this is, from undersigned counsel's point of view, not ideal as it places the burden on counsel and the defendant, it would still provide this Court with additional information relevant to deciding whether the death penalty was excessive or disproportionate in a particular case. Undersigned counsel have confirmed that the Commission on Indigent Defense will make lists of potentially relevant cases available to any counsel addressing a direct appeal to this Court. *See* JA 1396–1399. In turn, counsel would need to identify the facts and present the cases he or she deemed pertinent to this Court.

As it stands, proportionality review in this state, for all practical purposes, does not exist. The initial expectation, espoused in *State v. Shaw*, that a pool of cases would eventually accumulate to form a basis for a meaningful review to avoid an arbitrary sentence has not come to fruition. The proof, so to speak, is in the pudding; in the forty-four year history of the post-*Furman* death penalty cases in South Carolina, this Court has never found a single death sentence to be excessive or disproportionate. Indeed, the Court even acknowledged as much in *State v. Dickerson*, stating: "our concern that restricting our statutorily-mandated proportionality review to only similar cases where death was actually imposed is largely a self-fulfilling prophecy as imply examining similar cases where the defendant was sentenced to death will almost always lead to the conclusion that the death sentence under review is proportional." 395 S.C. 101, 125, n.8, 716 S.E.2d 895, 908, n.8 (2011). Unless this Court creates a broader comparison pool, including cases that did not result in a death sentence, or allows capital defendants to provide information regarding cases which did not result in a death verdict, proportionality review will remain the dead letter it is today.

In sum, under any of these proposed methods of comparison, Moore's death sentence is excessive and disproportionate, and the writ of habeas corpus should issue.

CONCLUSION

For these reasons, this Court should grant habeas relief.

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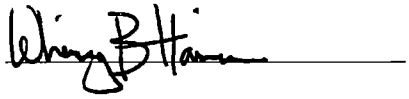
Respectfully submitted,



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